

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

DANIEL WHALEN,	:	
	:	
Plaintiff,	:	13 Civ. 3784 (LGS) (HBP)
	:	
-against-	:	OPINION
	:	<u>AND ORDER</u>
CSX TRANSPORTATION, INC.,	:	
<u>et al.</u> ,	:	
	:	
Defendants.	:	
	:	
-----X	:	

PITMAN, United States Magistrate Judge:

I. Introduction

By notice of motion dated December 18, 2015 (Docket Item ("D.I.") 205), plaintiff moves for sanctions against defendant CSX Transportation, Inc. for its alleged spoliation of the site of plaintiff's accident. For the reasons set forth below, plaintiff's motion is denied in all respects.¹

¹A Magistrate Judge has the authority to resolve a motion seeking sanctions spoliation so long as the motion is not resolved with a case dispositive sanction. Dorchester Fin. Holdings Corp. v. Banco BRJ S.A., 304 F.R.D. 178, 180 (S.D.N.Y. 2014) (Wood, D.J.) (collecting cases). Because I conclude that no spoliation has occurred and that no sanctions are appropriate, I can resolve the present motion and not merely recommend a resolution.

II. Facts

Plaintiff brings this action under the Federal Employers Liability Act, 45 U.S.C. §§ 51 et seq., alleging that on or about November 8, 2011, while employed by defendant CSX, he was injured while attempting to sit in a Zody Task Chair in the Carman's Office at CSX's Oak Point Yard, located in the Bronx, New York.² According to plaintiff, "when he went to sit in the

²The complaint in this action is a generic FELA complaint, routinely filed by plaintiff's counsel in a cases involving a wide variety of accidents. It does not specify the nature of the accident nor does it provide any specifics concerning how CSX allegedly violated its duties under the FELA or how, if at all, the condition of the Carman's Office was involved in the accident. For example, at paragraphs 8 and 9, the complaint alleges:

8. That on or about November 8, 2011 while the plaintiff, as an employee of the defendant, was in the performance of his duties as a Lead Carman at or near the aforesaid location, he was caused to sustain severe and disabling injuries as a result of the negligence, carelessness and recklessness of the defendant in failing to provide him with a safe place to work and/or safe tools, equipment and/or personnel with which to work, as hereinafter set forth.

9. That the said accident and resulting injuries to the plaintiff were caused solely by reason of the negligence, carelessness and recklessness of the defendant, its agents, servants and/or employees' [sic] in failing to exercise due care and diligence; in failing to provide plaintiff with a safe place to work and/or safe tools, equipment and/or personnel with which to work; in failing to promulgate safety rules and procedures for activities carried out by their
(continued...)

chair, it suddenly and without warning rapidly reclined all the way backwards, then just as suddenly the chair abruptly jerked back to its original upright position" (Plaintiff's Memorandum of Law in Support of Motion for Spoliation Sanctions, dated Dec. 18, 2015 (D.I. 206) ("Plaintiff's Mem.") at 2).³ As a result of the foregoing, plaintiff claims to have sustained injuries to his back. In addition to plaintiff's claims against CSX, CSX has brought a third-party action against the chair's manufacturer, Haworth, Inc., and the chair's seller, Office Environments Service Inc., alleging negligence, breach of warranty and related claims.

²(...continued)

personnel at the aforesaid place; in failing to warn plaintiff of the existence of the dangers involved in the performance of his duties as Lead Carman; in failing to provide the plaintiff with the necessary and proper tools, equipment and/or personnel with which to work; in failing to make proper and adequate provisions for the safety of plaintiff; in that the defendant failed to promulgate and enforce proper and safe rules for the safe conduct of the work operations of the railroad and the defendant was otherwise generally negligent under the circumstances.

The specific facts set forth herein concerning plaintiff's accident are based on the proceedings and the parties' submissions subsequent to the pleadings.

³An accident report prepared by plaintiff himself on the day of the accident describes the incident as follows: "Sat in Office Chair. Chair unexpectedly rapidly reclined. Expecting a fall [I] jerked forward to regain balance" (Personal Injury Report of D. Whalen at 10, annexed as Exhibit 6 to Plaintiff's Mem.) .

This matter was assigned to me for general pretrial supervision in January 2014, and since that time, I have had to resolve several discovery disputes among the parties. However, until the present motion, plaintiff never raised any issue concerning the site of the accident; rather, the focus of the litigation prior to the present motion has been on the characteristics of the chair. Although plaintiff's counsel now claims that the condition of the floor is a "crucial" piece of evidence (Plaintiff's Mem. at 6), he raised no issue concerning a site inspection at discovery conferences held on March 6, 2014, May 27, 2014, November 13, 2014 and May 12, 2015. To the contrary, when I asked plaintiff's counsel at the conference held on November 13, 2014 what discovery he still sought to take, he stated only that he sought to take three or four additional depositions; he expressed no interest in a site inspection (Transcript of Proceedings held on November 13, 2014 (D.I. 66) at 2-3). At that same conference, there was an extended discussion about defense counsels' request that plaintiff demonstrate at his deposition how the accident occurred. Although plaintiff's counsel raised various objections to this request, he raised no issue concerning the involvement of the floor or any other features of the Carman's Office in the accident (Transcript of Proceedings held on November 13, 2014 (D.I. 66) at 12-16).

At a fourth discovery conference held on May 12, 2015 there was a discussion concerning the third-party defendants' request for a site inspection; plaintiff never made such a request. During the course of that discussion, CSX's counsel stated

Judge, all I really want to add to this is there has been no testimony that the chair moved, that the chair rolled, that the chair slipped. There's been no testimony bringing anything into effect about the floor. All right. Two witnesses say including the plaintiff that the chair stayed on its wheels

(Transcript of Proceedings held on May 12, 2015 (D.I. 120) at 13-14). Plaintiff's counsel said nothing contradicting the foregoing statement by CSX's counsel nor did he suggest in any way that the condition of the floor or the office was relevant to the action.

The present motion appears to be prompted by renovations CSX made to the Carman's Office. Beginning in March 2015, CSX covered the concrete floor of the Carman's Office with interlocking rubber tiles and replaced the furniture and other fixtures in the office (Declaration Luis Perez, dated Sept. 30, 2015 (D.I. 248), ¶¶ 2-3). There is no dispute that there was a crack in the concrete floor of the office at the time of the accident; it is not clear whether plaintiff is now claiming that this crack played a role in the alleged accident. There also

appears to be no dispute the rubber tiles CSX placed on the floor are removable, are not glued to the floor and that the concrete floor beneath the rubberized tiles is still in the same condition it was in as of the date of the accident (Declaration of Leo Haines, dated Sept. 29, 2015 (D.I. 250) ¶¶ 4-5; Declaration of Edward Casey, dated Jan. 5, 2016 (D.I. 251) ¶¶ 2-3; Plaintiff's Mem. at 8-9). Prior to the present motion, plaintiff never advised CSX that the floor of the Carman's Office or any other aspect of the office was relevant to plaintiff's claim.

In his present motion, plaintiff claims that CSX has committed spoliation by "materially changing the physical characteristics of the premises in terms of its flooring material (from concrete to a rubberized surface), the ceiling tiles, all furniture, including desks, lockers and chairs, and the configuration of the furniture of the room" (Letter from Philip J. Dinhofer, Esq. to the undersigned, dated Sept. 11, 2015 (D.I. 153) ("Sept. 11 Letter") at 1; see also Plaintiff's Mem. at 14 ("CSX was unquestionably under a lawful duty to preserve and make available for the parties inspection the entirety of the accident site, including the relevant structures and conditions of the accident location, its flooring, furniture and wall hangings")). Plaintiff does not articulate how any feature of the office, other than the floor, may have played any role in the alleged

accident. Moreover, to the extent plaintiff attempts to establish a link between the floor and the accident, he relies entirely on the testimony of CSX's expert.

III. Analysis

A. Applicable Legal Principles

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." West v. Goodyear Tire & Rubber, Co., 167 F.3d 776, 779 (2d Cir. 1999); see also Fujitsu Ltd. v. Fed. Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."). "[T]he spoliation doctrine is predicated on 'evidence actually exist[ing] and [being] destroyed.'" Estate of Jackson v. County of Suffolk, No. 12-1455 (JFB) (AKT), 2014 WL 1342957 at *8 (E.D.N.Y. Mar. 31, 2014), adopted sub nom. at, Estate of Jackson ex rel. Jackson v. County of Suffolk, No. 12-CV-1455 (JFB) (AKT), 2014 WL 3513403 (E.D.N.Y. July 15, 2014) (alteration in original), quoting Orbit One Commc'ns v. Numerex Corp., 271 F.R.D. 429, 441 (S.D.N.Y.

2010) (Francis, M.J.). Violation of a court order is not a condition precedent to the imposition of sanctions for spoliation. A court may impose sanctions on a spoliating party based on its "inherent power to control the judicial process and litigation, but [that] power is limited to that necessary to redress conduct which abuses the judicial process." Passlogix, Inc. v. 2FA Tech., LLC, 708 F. Supp. 2d 378, 409 (S.D.N.Y. 2010) (Leisure, D.J.) (internal quotation marks omitted), quoting Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (Scheindlin, D.J.), abrogated on other grounds, Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012).

A party who seeks sanctions based on the spoliation of evidence must show: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422, 430 (S.D.N.Y. 2004) (Scheindlin, D.J.); see also Chin v. Port Auth. of N.Y. & N.J., supra, 685 F.3d at 162. The duty to preserve evidence is not unlimited.

While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.

Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (citations omitted); accord Skeete v. McKinsey & Co., 91 Civ. 8093 (PKL), 1993 WL 256659 at *3-*4 (S.D.N.Y. July 7, 1993) (Leisure, D.J.); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (Francis, M.J.); see also 2 Michael Silberberg, Edward M. Spiro & Judith L. Mogul, Civil Practice in the Southern District of New York § 21:5 at 251 (2015-2016 ed.).

B. Application of
Law to the Facts

In light of the differences in their possible connection to plaintiff's action, it is appropriate to consider separately the alterations to the floor and the alterations to the other characteristics of the Carman's Office.

Assuming without deciding that the condition of the floor is somehow relevant to plaintiff's claim,⁴ there is no

⁴I am not aware of any contention by plaintiff that the
(continued...)

basis for spoliation sanctions because no evidence has been destroyed. CSX has presented uncontroverted evidence that the concrete floor, with the crack in it, still exists beneath the rubber tiles and that the crack can be seen by simply lifting the tiles. Because the concrete floor has not been altered, destroyed or rendered inaccessible, there is no basis for spoliation sanctions. "Where a party seeks sanctions based on the spoliation of evidence, it must establish 'that the sought-after evidence actually existed and was destroyed.'" Skyline Steel LLC v. PilePro, LLC, 101 F. Supp. 3d 394, 408 (S.D.N.Y. 2015) (Furman, D.J.), quoting Farella v. City of New York, 05 Civ. 5711 (NRB), 2007 WL 193867 at *2 (S.D.N.Y. Jan. 25, 2007) (Buchwald, D.J.)

To the extent plaintiff seeks spoliation sanctions based on CSX's alteration of the other characteristics and furnishings of the Carman's Office, plaintiff's motion is derailed by his failure to state any logical connection between the

⁴(...continued)
wheels of the chair on which he was seated caught on some defect in the floor or that the chair was otherwise affected by the floor before he experienced the backward and forward motion he alleges. Plaintiff's counsel cites no testimony from plaintiff or any other percipient witness implicating the condition of the floor in plaintiff's accident. In addition, if plaintiff is alleging some connection between the condition of the floor and his accident, it is odd that plaintiff waited until almost four years after the accident to assert that connection.

characteristics and furnishings in the Carman's Office that were altered and the accident. He does not claim that the chair collided with some other piece of furniture, that he tripped on some other piece of furniture or that the other furniture and fixtures played any role in the accident. In short, plaintiff has not demonstrated that the characteristics of the Carman's Office other than the floor are sufficiently relevant to trigger a duty to preserve.⁵

IV. Conclusion

Accordingly, for all the foregoing reasons, plaintiff's motion for sanctions based on CSX's alterations to the Carman's

⁵Because I need not reach the issue, I do not decide the interesting question of what steps CSX should have taken to preserve the other characteristics of the Carman's Office if plaintiff had established relevance. Although plaintiff seems to suggest the Carman's Office should have been sealed after the accident and preserved like King Tut's tomb, such a suggestion is clearly unreasonable.

Office is denied in all respects. The Clerk of the Court is directed to mark Docket Item 205 closed.

Dated: New York, New York
September 7, 2016

SO ORDERED


HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:

All Counsel